Supreme Court of the United States

OCOTBER TERM, 1945.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, entered June 27, 1945 (R.), is not yet reported. The opinion of the District Court (R. 21, 27) is not yet reported.

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this Court is invoked, meeting the requirements of Rule 12, Par. 1, has been made under "Statement of the Jurisdiction of this Court," Part B, of the foregoing petition for *certiorari*, which is adopted and made a part of this brief.

III.

STATEMENT OF THE CASE.

Plaintiff has stated the case in the "Summary Statement of the Matter Involved," Part A, of the foregoing petition for *certiorari*, which is adopted and made a part of this brief.

After the judgment for plaintiff rendered by Judge Reeves was reversed and remanded upon the first appeal, and after the Supreme Court of Missouri had handed down its opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, the defendant filed a motion for costs, and Judge Reeves filed his memorandum opinion on motion for costs. Upon the second trial before Judge Otis he made Judge Reeves's memorandum opinion a part of the record (R. 23), and that part of the opinion of Judge Reeves germane here is as follows:

> "4. The opinion of the Court of Appeals should be considered on these motions. The Court of Appeals in its decision relied largely on the case of *Davis* v. *Cities Service Oil Co.*, (Mo. App.) 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Ap-

peals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor*, 174 S. W. 2d 844, l. c. 849. The Supreme Court announced the identical principle applied at the trial of this case.

The Court quoted approvingly in Bartlett's case:

"'His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.'"

"This was a quotation from *Marks* v. *Nambil Realty Co.*, 245 N. Y. 256, 157 N. E. 129. In that case the revered Mr. Justice Cardozo, who was at that time one of the New York Appellate Judges, prepared the opinion.

"The Supreme Court of Missouri then reached its conclusion and said:

> 'It is our view that the requirement of the Restatement of the Law of Torts that the repairs must "make the land more dangerous for use" and its appended comment to that effect should not be adopted or followed. *It necessarily follows that in so far as the Logsdon and Davis cases adopt that rule they are and should be overruled.*'

"5. An inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, supra.*

"The tenant (lessee) testified without equivocation that the defendant had contracted with him to put the entire premises in a safe and habitable condition and that in reliance upon that agreement he became a tenant of the property. While it was true that the defendant, through its agent, showed the tenant some particular repairs that it intended to make, this was not conclusive and was not intended to

be conclusive upon the tenant as to what repairs were in fact to be made. It was the agreement that the defendant would inspect the premises and make all the repairs necessary to make the premises safe. It was the evidence that a reasonable inspection would have disclosed the obvious weakness of the fourth tread of the stairway from the bottom. It was not patent to an unskilled person but should have been obvious to a qualified inspector.

"Findings of Fact were made with respect to those matters but the Court of Appeals did not consider such findings. In its opinion, it said:

> 'But if, for the sake of argument, it be assumed that the defendant might be held for any failure to exercise ordinary care in the repair of the entire stairway, we do not believe there is substantial evidence to sustain the judgment.'

"Findings of Fact were made by the trial court, that there was substantial testimony on that identical question. The Court of Appeals did not point out wherein the testimony failed but merely expressed the opinion without comment that the fact was not sustained. Rule 52 of the New Rules of Civil Procedure particularly provides that:

> 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

"Such a rule is predicated, of course, upon the 7th Amendment to the Constitution of the United States. This Amendment preserves the right of trial by jury and then provides as follows:

> '* * * and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.'

"It should be noted that in the *Bartlett case, supra*, recovery was permitted notwithstanding the fact that the plaintiff was experienced in carpentry and therefore somewhat familiar with the identical matters which occasioned his injury."

IV.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in deciding that under the Missouri law plaintiff was not entitled to recover from the defendant except for negligence of the defendant in *acts* of actually attempted repair to the fourth tread of the stairway in question.

(2) The Circuit Court of Appeals erred in deciding the question of defendant's negligence contrary to the law of Missouri and in not holding that if the defendant *assumed* to repair the stairway it was liable for failure to exercise ordinary care to discover and repair the defective fourth tread, even though defendant performed no repairs upon that tread.

(3) The Circuit Court of Appeals erred in deciding that the Supreme Court of Missouri in *Bartlett* v. *Taylor*, 174 S. W. 2d 844 did not overrule the basis of the decision of the Circuit Court of Appeals upon the first appeal, 124 F. 2d 684.

(4) The Circuit Court of Appeals erred in deciding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway contrary to the undisputed evidence that the defendant assumed to repair the entire stairway and entered upon the performance thereof by making an in-

spection and examination of all structural parts of the stairway.

(5) The Circuit Court of Appeals erred in deciding that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the undisputed and overwhelming evidence that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care could and should have known of the defective and dangerous condition which caused plaintiff's injury, and although, prior to the letting to Sweeney, it had knowledge of facts which put it on inquiry as to said defective and dangerous condition.

(6) The Circuit Court of Appeals erred in refusing to follow and be bound by the trial court's Findings of Fact 12 and 13.

(7) The Circuit Court of Appeals erred in deciding that plaintiff was not entitled to recover under the concealed defect theory when the trial court had made its findings of fact, supported by ample and sufficient evidence, that defendant, through Butterworth, had knowledge of the longitudinal split in the fourth tread and was thereby put upon inquiry as to the safety of the tread, and notwithstanding such knowledge negligently failed to inform its tenant or plaintiff of the dangerous condition.

(8) The Circuit Court of Appeals erred in not following and applying the law and controlling decisions of the state of Missouri holding that a landlord is liable to a tenant or his invitees if the landlord, prior to letting, knew of dangerous conditions or had knowledge of

facts from which he ought to have known, or will be presumed to have known of them. The trial court having found that the defendant had knowledge, prior to the letting, of the existence of a longitudinal split and that such knowledge would have put the defendant on inquiry concerning the safety of the fourth tread, the Circuit Court of Appeals erred in not ordering judgment for the plaintiff, and remanding the cause for the assessment of damages.

V.

SUMMARY OF THE ARGUMENT.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in *acts* of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a

federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed by any federal statute or federal policy. The rule of *Erie R. R. Co.* v. *Tompkins* applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of *Erie R. R. Co.* v. *Tompkins* is not strictly applicable.

Point C.

In ruling that the plaintiff is not entitled to recover under the concealed defect theory, the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The Circuit Court of Appeals having held that the longitudinal split was obvious, and the trial court having made its Findings of Fact 12 and 13 that the defendant, prior to the letting, knew of the longitudinal split and was thereby put on inquiry concerning the safety of the fourth tread, the Circuit Court of Appeals has refused to follow and be bound by the last and controlling decisions of the state of Missouri holding that a landlord is liable to his tenant or his invitees if prior to the letting the landlord knew of the dangerous condition or had knowledge of facts that put it on inquiry concerning the safety of the tread or had knowledge of facts from which it will be presumed it had knowledge of the safety of the tread. The Circuit Court of Appeals refused to apply and follow the law as announced in *Meade* v. *Montrose*, 173 Mo. App. 722, and other applicable decisions.

Point D.

The trial court having made its Findings of Fact 12 and 13 which were supported by ample evidence, and having made its finding of fact that the longitudinal split was obvious and that the defendant prior to the letting knew thereof and was thereby put on inquiry concerning the safety of the fourth tread the Circuit Court of Appeals has violated the provisions of Rule 52 (a), Federal Rules of Civil Procedure.

ARGUMENT.

From the foregoing "Summary Statement of the Matter Involved," Part A of the foregoing petition, the following simple facts appear.

The defendant was the owner of this untenantable and unsaleable house; it decided in the Spring of 1938 that the house should be reconditioned throughout, including the basement stairway, and in June, 1938, had the head of its reconditioning department, Roy L. Butterworth, make a detailed inspection and examination of the premises, including the basement stairway, for the purpose of preparing specifications for such reconditioning; in June, 1938, Butterworth made this inspection and examination and examined all the structural parts of the basement stairway for the purpose of determining that it was in sound condition; there was a longitudinal split in the fourth tread, counting from the top, which had existed for a long time; the tread was 32 inches long and the two parts thereof were about 9 inches wide leaving the front half about three and seven-eighths inches; it was made of two inch material planed to one and seven eighths. The crack was filled with lint and paint had run down into the crack; the overhang was one and one-half inches; the horse underneath the tread at the east end was split away; there were two eight penny nails at the east end of the front half of the tread; one of these nails did not penetrate the horse underneath the tread because the horse had been split away, and the nail protruded outside the horse and was covered with paint so that only one eight penny nail, which was rusty, held the east end of the front half of the fourth tread; Butterworth, in inspecting the stairway stood on

the basement floor with his face just a short distance from the east end of the tread and he saw its condition; the undisputed testimony was that the tread being split in two and having an overhang of an inch and a half was not safe; the trial court found in Findings of Fact 12 and 13 that the tread was not safe by reason of the aforesaid facts; the Circuit Court of Appeals upon the first appeal held that the longitudinal split was obvious; the trial court upon the second trial held that knowledge of the longitudinal split would have put a skilled artisan, Butterworth, on inquiry as to the safety of the tread.

For some reason, not shown by the evidence, Butterworth failed to list the repair of the fourth tread in his specifications but included in them only the replacement of a broken board in the landing

In the latter part of July, 1938, George H. Sweeney, noticing that the premises were for rent, went to the rental agent of the defendant and obtained the key to the house and looked it over and went up and down the basement stairs and found that they were shaky and not in good condition, and he went back to the agent and told him, among other things, that the basement stairway was not in good condition. And the agent advised him that the defendant was going to spend some $800 in repairs on the place and Hess, the agent, told him that the repairs "would be generally complete" and "that the house would be placed in rentable condition" (R. 71), which is the testimony of Hess called as a witness by the defendant. Sweeney then agreed to rent the premises for $25 a month, occupancy to begin September 1st; on August 15, 1938, he paid the first month's rent. At that time the defendant let a contract to one Hansen to recondition the premises as provided by the specifications which the defendant had prepared. From the time the

work started in August until it was completed shortly after the first of September, the defendant employed Robert S. King, an inspector, and his duties were not only to inspect the work done by Hansen but also to inspect the premises for anything that would be hazardous, and in the performance of his duties he made five inspections of the basement stairway, examining all structural parts, the treads, stringers, the supports and all parts of the stairway.

On September 1, 1938, Sweeney and his family moved into the premises, and in November the plaintiff was employed by Sweeney and his wife as a beauty operator and lived in the house and remained there until January 27, 1939, when she was hurt as shown in the "Summary Statement of the Matter Involved" in the petition.

Upon the first trial before Judge Reeves, sitting without a jury, the plaintiff submitted her case solely upon the "negligent repair theory" and the Court rendered judgment in favor of the plaintiff for $20,000, and made his separate findings of fact and conclusions of law. Upon appeal the Circuit Court of Appeals reversed and remanded the judgment holding that the defendant was not liable because the plaintiff had failed to prove that the defendant had *actually* attempted to repair the fourth tread. Thereafter the Supreme Court of Missouri in the case of *Bartlett* v. *Taylor,* 174 S. W. 2d 844, overruled the case of *Davis* v. *Cities Service Co.,* 110 S. W. 2d 865, which had been relied upon and was the actual basis for the decision of the Circuit Court of Appeals in reversing the judgment rendered by Judge Reeves. The *Davis* case had held in substance that a landlord is not liable for negligent repairs unless he makes "the land more dangerous for use," in other words, that a plaintiff must show that the defendant actually worked upon

the defective step or place and negligently repaired the same before the defendant landlord could be held liable. The *Bartlett* case overruled the *Davis* case holding:

> "It is our view that the requirement of the Restatement of the Law of Tort that the repairs must 'make the land more dangerous for use' and its applied comment to that effect should not be adopted or approved. It necessarily follows that insofar as the *Logsdon* and *Davis* cases adopted that rule they should be overruled."

After the decision in the *Bartlett* case the plaintiff sought to have the court dismiss this action without prejudice and the defendant made a motion for costs. The trial court entered its order dismissing the case without imposing terms and Judge Reeves filed his memorandum opinion in which he pointed out:

> "The Court of Appeals in its decision relied largely upon the case of *Davis* v. *Cities Service Oil Co. et al.*, 131 S. W. 2d 865. Very recently this case was overruled insofar as it was made applicable by the Court of Appeals in this case. The Supreme Court of Missouri overruled the opinion in *Bartlett* v. *Taylor,* 174 S. W. 2d 844, l. c. 849.
>
> The Supreme Court announced the identical principle applied at the trial of this case," and "an inspection of the files indicates that the case as tried here was determined upon a somewhat different theory in the Court of Appeals. The case as tried here was in precise accordance with the rule announced in *Bartlett* v. *Taylor, Supra.*"

The Court of Appeals reversed Judge Reeves and held that even though the plaintiff had filed her affidavit that she was a pauper the trial court had no authority to dismiss the case without prejudice since plaintiff's counsel, having a contingent contract, had not filed an affidavit that they were paupers, thereby holding in

effect that counsel for plaintiff were required to pay the costs of the litigation which would make them subject to the charge of champerty and maintenance if they had made such an agreement when they were employed by plaintiff as her counsel.

The order of dismissal was thus revoked and Judge Reeves then, of his own motion, transferred the case to Judge Otis to try. Upon the trial before Judge Otis the case was submitted upon both the negligent repair theory and the concealed defect theory and extensive trial briefs were furnished the Court upon both theories. Judge Otis found for the defendant and made his separate findings of fact and conclusions of law but did not pass upon the concealed defect theory. Thereupon the plaintiff made her motion for new trial and called the Court's attention to the fact that the concealed defect theory had not been mentioned in his opinion. It was then for the first time that Judge Otis decided that issue in the memorandum and order (R. 32). Judge Otis said:

> "2. It was said by counsel that if in the trial the evidence was essentially the same as in the earlier trial, nevertheless a new issue was emphasized at this trial, the issue of hidden, latent, defect, known to the landlord and concealed from the tenant. Our findings 11, 12 and 13, are pointed to as relevant to that issue and as proving plaintiff's theory in connection with that issue. We think the conclusion is a *non-sequitur*. For one thing, defendant owed no duty to plaintiff or his tenant to make an inspection of the stairway on which plaintiff was injured and never undertook to inspect or repair the fourth tread."

The reason given by Judge Otis as to why the plaintiff was not entitled to recover under the concealed de-

fect theory that "defendant owed no duty to plaintiff or his tenant to make an inspection of the stairway on which plaintiff was injured * * *" shows plainly that he had an erroneous conception of the law of Missouri that if a landlord has knowledge of facts which put him on inquiry as to the safety of the tread, such knowledge is equivalent to actual knowledge of the defect and defendant is liable if he fails to inform the tenant or the plaintiff thereof. We shall discuss this subject later.

After the Circuit Court of Appeals affirmed the judgment for the defendant rendered by Judge Otis, the plaintiff filed her petition for rehearing. As plaintiff is a legal pauper, in order to save expense and to simplify the argument, we have decided to use the petition for rehearing as a part of this argument, as it expresses concisely our views. The petition is as follows: